Nos. 77-83

In the Supreme Court of the United States

OCTOBER TERM, 1945

UNITED STATES OF AMERICA, PETITIONER

v.

PETTY MOTOR COMPANY

UNITED STATES OF AMERICA, PETITIONER

v.

MERRILL J. BROCKBANK, DOING BUSINESS AS BROCKBANK APPAREL COMPANY

UNITED STATES OF AMERICA, PETITIONER

v.

WILLIAM G. GRIMSDELL, DOING BUSINESS AS GROCER PRINTING COMPANY

UNITED STATES OF AMERICA, PETITIONER

v.

CHARLES F. WIGGS, DOING BUSINESS AS CHICAGO FLEXIBLE SHAFT COMPANY

UNITED STATES OF AMERICA, PETITIONER

v.

INDEPENDENT PNEUMATIC TOOL COMPANY

UNITED STATES OF AMERICA, PETITIONER

v.

THE GALIGHER COMPANY

UNITED STATES OF AMERICA, PETITIONER

v.

GRAY-CANNON LUMBER COMPANY

WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 77

UNITED STATES OF AMERICA, PETITIONER

v.

PETTY MOTOR COMPANY [1]

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the circuit court of appeals (R. 621–624) is reported in 147 F. 2d 912. The district court did not write an opinion.

[1] Together with No. 78, *United States of America, Petitioner* v. *Merrill J. Brockbank, Doing Business as Brockbank Apparel Company;* No. 79, *United States of America, Petitioner* v. *William G. Grimsdell, Doing Business as Grocer Printing Company;* No. 80, *United States of America, Petitioner* v. *Charles F. Wiggs, Doing Business as Chicago Flexible Shaft Company;* No. 81, *United States of America, Petitioner* v. *Independent Pneumatic Tool Company;* No. 82, *United States of America, Petitioner* v. *The Galigher Company;* and No. 83, *United States of America, Petitioner* v. *Gray-Cannon Lumber Company.*

JURISDICTION

The judgments of the circuit court of appeals were entered on March 5, 1945 (R. 625–626). The petition for writs of certiorari was filed on May 15, 1945, and was granted on June 18, 1945 (R. i, 628–630). The jurisdiction of this Court rests upon Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether tenants occupying property condemned by the United States for temporary use for a period longer than the tenants' existing leases are entitled to prove moving costs and consequential damages resulting from the enforced removal as evidence of the value of their interests.

2. Whether month-to-month tenants are entitled, upon condemnation of the leased property by the United States, to compensation based upon such indefinite period of time as the jury should conclude the tenants might have continued to occupy the property.

STATUTE INVOLVED

Title II of the Second War Powers Act of March 27, 1942, 56 Stat. 177, c. 199, sec. 201, 50 U. S. C. App. Supp. IV, sec. 632, is set forth in the Appendix, *infra*, p. 42.

STATEMENT

On November 9, 1942, the United States instituted proceedings, under the authority of the Second War Powers Act of March 27, 1942, Appendix, *infra*, p. 42, to condemn, for temporary use by the

Army, a building in Salt Lake City, Utah, known as the Old Terminal Building. The estate sought was a leasehold interest expiring June 30, 1945, with the right of election on the part of the United States to surrender possession on June 30, 1943, or on June 30, 1944, upon giving sixty days' notice. (R. 3–5.)

The building, owned by W. B. Richards, Jr., who had purchased it in October 1942 (R. 179, 211), was partly vacant (R. 353), the remainder being occupied by various tenants. The owner and tenants were made parties to the proceedings (R. 3–5). On November 11, 1942, all parties having appeared by counsel or in person pursuant to an order to show cause, the trial court granted the Government exclusive possession and, by consent, fixed a series of dates between November 17 and December 1, 1942, for each of the tenants to vacate (R. 5–8, 153). The owner and seven of the ten tenants (R. 7) participated in subsequent proceedings (R. 9–52, 89, 149). Five of the tenants—the Galigher Company (R. 245), Grocer Printing Company (R. 158), Chicago Flexible Shaft Company (R. 218), Brockbank Apparel Company (R. 382) and Gray-Cannon Lumber Company (R. 323)—had no written leases but were in possession on a month-to-month basis (R. 621–622). The Independent Pneumatic Tool Company had a written lease which provided that the term and all rights under the lease would terminate if possession of the premises was taken by a federal, state, or other

public authority for public use (R. 201–202; 622).[2] The Petty Motor Company had a written lease of the basement of the building for a term of one year beginning October 31, 1942, with the right to renew for another year (R. 433–436).

The tenants' claims for compensation were based principally upon expenditures incurred in moving out of the Old Terminal Building, renovating and remodeling the premises to which they moved and reinstalling equipment at the new premises, and the increased rents required of them at their new premises (*e. g.*, R. 9–52, 184–186, 198, 230 268–269, 329–332, 394–395, 459). The chief issues in the district court related to the admissibility of evidence of such items (*e. g.*, R. 154–155, 158–159, 167, 172, 195, 223, 287, 328, 391–392, 393–394, 447) and whether, in any event, tenants from month-to-month were entitled to compensation (*e. g.*, R. 158–159).

In answers by some of the tenants, these claims as to compensation were set forth (R. 9–11, 13–16, 17–32, 38–52). The Government attacked the tenants' claims by moving for summary judgment as to the tenants who had no written leases and by moving to strike allegations relating to items which the Government claimed were not compensable (R. 16, 17, 32–37, 152–153). The legal issues thus raised were argued and decided at a pre-trial conference

[2] This company had a lease expiring November 30, 1942, but a new lease for five years, commencing December 1, 1942, had been executed on August 10, 1942 (R. 201–202). The same "condemnation clause" was contained in both leases (R. 201–202).

had on March 12 and 15, 1942 (R. 89–148). The Government contended that the only issue between the United States and the various defendants, including the owner and the tenants, was the fair rental value of the entire building for the period taken and that the apportionment and distribution of the sum thus determined was a matter to be worked out between the landlord and the tenants (R. 116, 118–119). The United States relied upon *Carlock* v. *United States*, 53 F. 2d 926, 927 (App. D. C.) which holds that when various persons have separate interests or estates in the property taken, just compensation is determined as if the property were in a single ownership without reference to conflicting claims, and then apportioned among the parties according to their respective interests. The district court ruled that there were two separate issues: that between the United States and the owner the issue was the reasonable rental value of the premises taken and that between the United States and the tenants the issue was "the compensation, if any, which they may be entitled to recover by reason of having to relinquish occupancy of said premises" (R. 38; see also R. 136–141).

On the issue of the measure of compensation payable to the tenants, the court ruled that loss of profits could not be considered and that, although the various expenditures claimed by the tenants to have been incurred in moving, renovating and remodeling their new premises, etc., could not be recovered as

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separate items of damage, evidence of such expenditures was admissible to show the value of the tenants' "rights of occupancy" (R. 141–148). Accordingly, the allegations of the answers as to loss of profits were stricken, as were the allegations claiming other expenditures as separate items, but permission was given to amend the answers to set out the latter items as showing the value of the rights of occupancy (R. 142–148). The Government's motions for summary judgment as to tenants who had no written leases were denied (R. 141–142, 152–153).

At the trial before a jury, all of the tenants introduced evidence of the expenditures incurred in moving out of the Old Terminal Building, renovating and remodeling the premises to which they moved, reinstalling equipment at the new premises and the increased rents they were required to pay at their new premises (*e. g.*, R. 184–186, 198, 230, 268–269, 329–332, 394–395, 459). In addition, F. Orin Woodbury, a real estate agent, testified on behalf of the Grocer Printing Company, the Chicago Flexible Shaft Company, the Galigher Company, and the Independent Pneumatic Tool Company (R. 291–294). Although admitting on cross-examination that a month-to-month tenancy could not be sold in the market (R. 312), this witness expressed the opinion that the "value" of the occupancies of the first three companies named was, respectively, $12,500, $4,500, and $7,500 (R. 293–294). In arriving at this opinion of value, he considered the difference between the rents formerly paid at the Old Terminal Building

and those paid at the premises to which the tenants moved, the cost of moving and reinstalling equipment, the cost of renovating or remodeling the new premises, the comparison between the Old Terminal Building and the new premises, the length of time the tenant had occupied the Old Terminal Building, the locality, and the business carried on (R. 293–294, 314). Basing his opinion upon similar considerations, Woodbury valued the interest of Independent Pneumatic Tool Company at $3,500 (R. 293). Besides evidence of the various expenditures, witnesses on behalf of Gray-Cannon Lumber Company and the Petty Motor Company gave their opinions of the rental value of the respective premises (R. 335, 455, 471). Two witnesses for the Government testified that the reasonable rental value of each of the tenant's premises was no more than the rent that each of the tenants was paying at the time of the taking (R. 481–486, 517–518, 539).

During the trial, the court told the jury that whether the tenants had term leases or occupied the premises from month-to-month, the measure of their damages would be for the jury to determine; that while the primary question was the loss which each tenant sustained, it would be for the jury to decide whether the measure of damages for the loss should or should not be based upon the cost of moving, the increase in rent, and similar matters (R. 159–161). The Government's blanket objection, made at the beginning of the trial, to all evidence on behalf of the month-to-month tenants and to all evidence of

expenditures resulting from the removal was consequently overruled, as were similar objections made during the trial (R. 154–155, 167, 172, 195, 223, 287, 323–324, 325, 391–392, 393–394, 444, 447). At the close of the testimony, the United States moved for a directed verdict as to all of the tenants except the Petty Motor Company, the only one conceded to have a compensable interest in the building (R. 566). The trial court denied the motion (R. 566) and instructed the jury to the effect that the tenants' "rights of occupation" had been taken; that such rights, whether under a lease or a month-to-month tenancy, were property rights for which compensation must be paid; and that the measure of just compensation was for the jury to determine considering all the evidence, such as the length of time the building had been occupied by the tenant, the cost of moving, the cost of remodeling and renovating their new premises, the increased rent, whether they were better or worse off in their new premises than in the Old Terminal Building, etc. (R. 569–574). The Government's objections to the charge were overruled (R. 575–576). Separate verdicts were returned for each tenant and judgments were entered thereon totaling $10,360 (R. 53–66).

No judgment was entered in favor of the owner of the building nor was any evidence introduced as to the rental value of the building as a whole. This was due to the fact that, pending the condemnation proceeding, the War Department had completed settlement negotiations for a lease of the entire

building from the owner (R. 317–318). When this fact appeared at the trial the United States moved that the proceedings be dismissed (R. 318–320). The motion was overruled (R. 320), but later the owner moved that the proceedings be dismissed as to him (R. 568). The United States joined in the motion, again asking that the proceedings be dismissed as to all the defendants (R. 568). The motion was granted as to the owner, but denied as to the other defendants (R. 568–569).[3]

Appeals taken by the United States from the judgments in favor of the tenants were briefed and, on March 21, 1944 (R. 620), submitted upon oral argument to the circuit court of appeals. No action was taken pending a decision by this Court in *United States* v. *General Motors Corp.*, 323 U. S. 373. After the *General Motors* case was decided, supplemental memoranda were filed and, on March 5, 1945, the circuit court of appeals affirmed the judgments of the district court (R. 624). In so doing the court below relied entirely on this Court's decision in the *General Motors* case, which was construed as holding that whenever less than fee simple title is condemned the established rules denying recovery of "consequential damages" do not apply (R. 624).

SPECIFICATION OF ERRORS TO BE URGED

The circuit court of appeals erred:

1. In holding that the tenants in this case were entitled to prove moving costs and consequential

[3] Although the owner was ordered dismissed from the proceedings, no formal judgment has been entered thereon.

damages resulting from the moving as evidence of the value of their interests.

2. In holding that the established rule denying consideration of consequential damages in determining just compensation is inapplicable whenever less than a fee simple title is taken.

3. In holding that a tenant whose lease provided for its termination upon the taking of all or any part of the demised premises by federal or other public authority is entitled to compensation.

4. In holding that month-to-month tenants are entitled to compensation based upon such indefinite period of time as the jury should conclude the tenants might have continued to occupy the property.

5. In affirming the district court's action in overruling the Government's objections to evidence of moving costs and other consequential damages.

6. In affirming the district court's action in overruling the Government's objections to any evidence on behalf of the month-to-month tenants.

7. In affirming the judgments of district court.

SUMMARY OF ARGUMENT

I

A. In this proceeding the United States condemned a leasehold interest in the Old Terminal Building for a temporary period expiring June 30, 1945, with the right to surrender possession on June 30, 1943 or June 30, 1944, upon giving sixty days' notice (R. 3–5). The court below conceded that the period thus taken extended beyond the

terms of the leasehold interests of the tenants occupying the building, with two possible exceptions (R. 624). Nevertheless, it held that under the decision of this Court in *United States* v. *General Motors Co.*, 323 U. S. 373, the district court was correct in admitting in evidence the costs incurred by all of the tenants in moving, the cost of renovating and remodeling the premises to which they moved, the cost of reinstalling equipment and increased rents they were required to pay at their new premises (R. 624). But in the *General Motors* case, this Court made it clear that whenever the United States condemns not only a fee but any other interest in property which is broad enough in scope to include a tenant's entire leasehold thus terminating altogether his interest, the cost of moving removable fixtures and personal property from the premises and other like consequential losses cannot be considered in determining just compensation for the interest taken, 323 U. S. at 382. The holding of the court below is therefore contrary to the *General Motors* decision rather than being supported by it.

B. The court below further held that whenever less than a fee simple title is condemned, the established rule denying recovery of "consequential damages" does not apply. In so ruling, it affirmed the district court's admission, not only of evidence of the actual cost of moving the tenant's property, but also of evidence concerning the tenant's unwillingness to move, the increased rent paid for other premises and the cost of remodeling and renovating the new prem-

ises to suit the particular tenant's needs, etc. However, in the *General Motors* decision, this Court held that even under the circumstances of that case, where only part of the tenant's leasehold term was taken, leaving him with the necessity of moving back after the expiration of the term taken or holding the remainder of his leasehold which might be altogether useless to him, consequential losses such as value peculiar to the tenant, value of good will or injury to his business could not be considered.

An owner's unwillingness to move and what it may cost him to find another location and make it suitable for his business may measure a value or business loss peculiar to him. But these considerations do not affect the amount which a willing buyer would pay for the property and cannot be considered in determining just compensation whether the interest taken is a fee simple title or a leasehold.

C. The statement of the court below that the term of the lease held by the Independent Pneumatic Tool Company extended beyond that of the interest condemned is erroneous. The Independent Pneumatic Tool Company lease provided that if the whole or any part of the demised premises were taken by federal, state or other public authority, the lease would terminate when possession was taken and the tenant would not be entitled to any part of an award made for the taking or to any damages therefor. A tenant whose lease contains such a clause is entitled to no compensation when the premises are condemned, for his interest in the property expires automatically

when condemnation occurs. If a settlement had not been made with the owner in this case, and the value of the entire interest taken had been determined and then deposited in court for apportionment and distribution among the landlord, the tenants, and any other claimants of an interest in the property, Independent Pneumatic would not have been entitled to share in the award. The fact that a settlement, in the form of a lease, was made with one of the claimants, the landlord, does not enlarge the tenant's rights.

The Petty Motor Company lease, which was characterized by the court as being a "possible" exception to those which terminated prior to the expiration of the use taken by the United States, was for a one-year term expiring October 31, 1943, with the right to renew for another year (R. 433–436). The leasehold interest condemned, which was to run until June 30, 1945, unless possession was surrendered upon due notice on June 30, 1943, or 1944, was a term for some thirty-one months subject to a contingent limitation. Thus, the term taken was longer than that of the Petty Motor Company lease.

II

Five of the tenants in this case had no written leases and were, as has been stated, occupying the premises on a month-to-month basis. Although recognizing that these tenancies could have been terminated at any time by the owner upon fifteen days' notice, the courts below did not limit the com-

pensation to the value, if any, of the actual terms. Instead, the month-to-month tenants were permitted to recover on the basis of whatever indefinite period of time the jury might conclude they might have continued to occupy the property if the United States had not condemned it (R. 140–141; 570–571; 574; 622).

The Fifth Amendment requires compensation only for property rights. Tenants occupying property condemned are entitled to recover compensation based upon the value of the terms they actually have and not upon the length of time they might have remained in possession of the property if it had not been condemned. Since a month-to-month tenant has no unexpired term it has been held that such a tenant is not entitled to any compensation. *United States* v. *Certain Lands, Etc.* 39 F. Supp. 91, 99 (E. D. N. Y.); cf. *Hanna* v. *County of Hampden*, 250 Mass. 107; *Tate* v. *State Highway Com'n.*, 226 Mo. App. 1216; *Lyons* v. *Philadelphia & Reading Ry. Co.*, 209 Pa. 550.

Furthermore, as the district court said, if the United States had first acquired only the lessor's interest in the property and given the tenants fifteen days' notice to vacate, it could have secured possession without liability to the tenants (R. 571). Certainly, the Government's liability under the Fifth Amendment should not depend upon formal variations in the method utilized to accomplish the same result. At most, the tenants were only entitled to compensation for the value of their occupancy, if

any, for the few days' difference between the notice they received and the fifteen days' notice to which they were entitled.

ARGUMENT

I

THE TENANTS IN THIS CASE WERE NOT ENTITLED TO PROVE EXPENSES INCURRED AS A RESULT OF BEING REQUIRED TO MOVE OUT OF PREMISES CONDEMNED BY THE GOVERNMENT AS EVIDENCE OF THE VALUE OF THEIR TENANCIES

A. *The expense incurred by a tenant in moving removable fixtures and personal property from premises condemned is not to be considered in determining just compensation when the tenant's entire interest in the property is taken.*—The United States condemned the Old Terminal Building for a period expiring June 30, 1945, with the right to surrender possession on June 30, 1943, or June 30, 1944, upon given sixty days' notice (R. 3–5). Throughout the case, the Government objected to the consideration of moving expenses for any purpose. (See *supra*, pp. 4–8.) And although the court below conceded that "the lease acquired by the government was for a term extending beyond the expiration of the lease owned by each of the tenants, with the exception of the lease owned by the Independent Pneumatic Tool Company, and possibly with the exception of the lease owned by the Petty Motor Company" (R. 624), it held that the principles announced in *United States* v. *General Motors Corp.*, 323 U. S. 373, are controlling whenever the United States condemns less than the fee simple

title and, consequently, that the district court was correct in allowing the jury to consider the costs incurred by all of the tenants in moving, the cost of renovating and remodeling the premises to which they moved, the cost of reinstalling equipment, and the increased rents they were required to pay at their new premises (R. 624).

In the *General Motors* case, the problem was to determine the proper measure of compensation when the temporary occupancy of a building is taken from a tenant holding under a long term lease who is obligated to continue paying rent under the terms of his lease during the Government's occupancy and who, presumably, would return to the building upon the termination of the Government's use. 323 U. S. 373, 380. The decision in that case not only reaffirmed the rule that the expense of moving removable fixtures and personal property from the premises and other like consequential losses cannot be considered when the United States condemns the fee, but it also made it clear that "when it [the Government] takes the property, that is, the fee, the lease, whatever he [the citizen] may own, *terminating altogether his interest*, under the established law it must pay him for what is taken, not more; and he must stand whatever indirect or remote injuries are properly comprehended within the meaning of 'consequential damage' as that conception has been defined in such cases." [Italics supplied] 323 U. S. at pp. 379–380, 382. It is only "when the Government does not take his entire interest, but by the

form of its proceeding chops it into bits * * * and leaves him holding the remainder" that the cost of moving out is to be considered in determining "what would be the market rental value of such a building on a lease by the long-term tenant to the temporary occupier" (323 U. S. at p. 382).

As will be shown, the entire interests of the tenants in this case have been taken. They will have no terms remaining after the temporary occupancy condemned by the Government expires. They have no obligation to continue to pay rent while the Government is in possession nor will they be obliged to return to the premises upon termination of the Government's use. They are in the same position they would have occupied had the Government taken the fee. Consequently, the decision of the court below, rather than being supported by this Court's decision in the *General Motors* case, is contrary to it.[4]

B. *Even a tenant whose entire interest is not taken when the Government condemns property for a temporary term cannot have consequential damages other than moving expenses resulting from the taking considered for any purpose.*—The court below held that whenever less than fee simple title is condemned the established rule denying recovery of "consequential damages" does not apply. It apparently believed the *General Motors* decision limited cases such as

[4] See *United States* v. *10,620 Square Feet, Etc. in Canadian Pacific Building*, decided August 28, 1945 (S. D. N. Y.). Copies of this opinion have been lodged with the Clerk of this Court.

Mitchell v. *United States*, 267 U. S. 341,[5] to instances where fee title is taken (see R. 324). On the contrary, in the *General Motors* case, this Court held that even when, as there, a temporary period for less than the term of an existing lease was taken "proof of value peculair to the respondent, or the value of good-will or of injury to the business of the respondent * * * must be excluded from the reckoning" (323 U. S. at p. 383). Many of the items which the lessees were permitted to introduce in evidence, despite the Government's objections, represented consequential damages other than expenses of moving their property out of the premises.

For example, the jury was permitted to consider the increased rents which the tenants paid for their new premises. These rentals were introduced, not to show what comparable property was renting for at the time of taking, but simply as one of a group of items which, in total, the tenants characterized as the loss they suffered (see R. 184–186, 198, 230, 268, 394, 459). Thus some of the tenants testified to the amount of their increased rents for the duration of the leases which they claimed they had to execute to obtain their new premises (from one to five years) (R. 186, 195, 230, 269) and one tenant who executed

[5] See also *United States ex rel. T. V. A.* v. *Powelson*, 319 U. S. 266, 281–282; *Joslin Co.* v. *Providence*, 262 U. S. 668, 676; *Omnia Co.* v. *United States*, 261 U. S. 502, 510–511; *Bothwell* v. *United States*, 254 U. S. 231.

a one-year lease for his new location claimed increased rent for 31 months (the duration of the term taken by the United Srates) (R. 393, 395–396).

The fact that the new premises cost more than the old may increase the tenant's overhead expenses and therefore reduce his net profits, but this is a business loss. In return for the rent he will pay, he will receive the use of the new location. The question to be determined is the market rental value of the property taken—not what it may cost to rent another particular piece of property or what it would cost to adapt it to the peculair requirements of the tenant's business. The question was not, as the trial court instructed the jury, whether the tenants were better or worse off in their new quarters (R. 572–573). As this Court pointed out in *United States* v. *Miller*, 317 U. S. 369, 373–374, "It is conceivable that an owner's indemnity should be measured in various ways depending upon the circumstances of each case and that no general formula should be used for the purpose. In an effort, however, to find some practical standard, the courts early adopted, and have retained, the concept of market value." "The owner must be compensated for what is taken from him, but that is done when he is paid its fair market value for all available uses and purposes." *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53, 81. In *United States* v. *General Motors*, 323 U. S. 373, 382, this Court again adhered

to the concept of market value.[6] While holding that certain items theretofore inadmissible as being speculative and consequential in nature and having no bearing on market value[7] are still inadmissible where fee

[6] The court below apparently thought that the *General Motors* decision had departed from the market value standard since it cited *United States* v. *Miller*, 317 U. S. 369, as one of the "long line of decisions" relied upon by the Government which were held to be inapplicable where less than fee title is condemned (R. 624).

[7] *Joslin Co.* v. *Providence*, 262 U. S. 668, 676; *Potomac Electric Power Co.* v. *United States*, 85 F. 2d 243, 249 (App. D. C.), certiorari denied, 299 U. S. 565; *Futrovsky* v. *United States*, 66 F. 2d 215, 216–217 (App. D. C.); *Gershon Bros. Co.* v. *United States*, 284 Fed. 849 (C. C. A. 5); *Pacific Live Stock Co.* v. *Warm Springs Irr. Dist.*, 270 Fed. 555, 559 (C. C. A. 9); *Wm. Wrigley, Jr., Co.* v. *United States*, 75 C. Cls. 569, 583–585; *Howard Co.* v. *United States*, 81 C. Cls. 646, 654; *Thermal Syndicate, Ltd.* v. *United States*, 81 C. Cls. 446, 454; *Chrystal* v. *United States*, 81 C. Cls. 461, 468; *United States* v. *Building Known as 651 Brannan Street*, 55 F. Supp. 667 (N. D. Cal.); *United States* v. *Certain Parcels of Land, Etc.*, 54 F. Supp. 561 (S. D. Cal.); *United States* v. *0.64 Acres of Land in Los Angeles County*, 54 F. Supp. 562 (S. D. Cal.); *United States* v. *Improved Premises, Etc.*, 54 F. Supp. 469–472 (S. D. N. Y.); *United States* v. *Entire Fifth Floor in Butterick Building*, 54 F. Supp. 258, 261 (S. D. N. Y.); *United States* v. *Meyers*, 190 Fed. 688 (D. Conn.); *Central Pac. R. R. Co.* v. *Pearson*, 35 Cal. 247, 263 (1868); *County of Los Angeles* v. *Signal R. Co.*, 86 Cal. App. 704, 710–712 (1927); *Mayor & C. C. of Balto.* v. *Gamse*, 132 Md. 290, 296–297 (1918); *New York, Etc. Railroad* v. *Blacker*, 178 Mass. 386, 391–393 (1901); *In re Assessment for Widening Third St., St. Paul*, 176 Minn. 389, 392 (1929); *St. Louis* v. *St. Louis, I. M. & S. Ry.*, 266 Mo. 694, 707 (1916); *Springfield S. W. Ry. Co.* v. *Schweitzer*, 173 Mo. App. 650, 655 (1913); *Ranlet* v. *Railroad*, 62 N. H. 561, 564 (1883); *Matter of New York, W. S. & B. R. Co.*, 35 Hun 633 (1885).

title is condemned, this Court concluded that under the peculiar circumstances of that case, where the temporary use of a building occupied under a long term lease was taken, such items would affect the market rental value, i. e., "the market price agreed upon by a tenant and a sublessee in such an extraordinary and unusual transaction." 323 U. S. 373, 383. But, even under those circumstances, this Court held that, "Proof of such costs as affecting market value is to be distinguished from proof of value peculiar to the respondent, or the value of good-will or of injury to the business of the respondent which, in this case, as in the case of the condemnation of a fee, must be excluded from the reckoning." *Ibid.* If the measure of compensation is the market rental value of the property taken, the inability of the tenant to obtain another location which would, to his satisfaction, meet the requirements of his particular business, without paying a higher price for it or without remodeling or making alterations to fit his needs cannot be considered. While such matters "will doubtless affect the price at which [the owner] would have been willing to sell his property, [they] will not affect the price at which he *could* have sold it." Orgel, *Valuation Under Eminent Domain* (1936) sec. 70, p. 236. To the extent that the tenant's inability to find suitable quarters is typical of a general difficulty, market value will reflect such embarrassment.

Furthermore, "it is usually said that market value is what a *willing buyer* would pay in cash to a *willing*

seller." [Italics supplied.] *United States* v. *Miller*, 317 U. S. 369, 374; see also *Olson* v. *United States*, 292 U. S. 246, 257. The fact that a tenant "did not want to move, wanted to stay there, would have paid a very large sum to stay there, is not a test of market value, because it is not a case of one who wants to sell and one who wants to buy. If [he] had wanted to go out, the question is, what would his lease have brought? Not what it would have been worth to him if he had wanted to stay there, because it may have been of greater value or of less value to him than its value upon the market." *Lawrence* v. *Boston*, 119 Mass. 126, 128–129; cf. R. 174–175, 228, 259; see also *Kishlar* v. *Southern Pac. R. Co.*, 134 Cal. 636; cf. *United States* v. *Honolulu Plantation Co.*, 122 Fed. 581, 584–585; *United States* v. *Miller*, 317 U. S. 369, 375; *United States* v. *General Motors Corp.*, 323 U. S. 373, 383. Unless the *willing buyer* is to be eliminated entirely from consideration and compensation determined solely on the basis of what an *unwilling seller* would demand for his property, the decision of the court below cannot stand.[8] The fact that the trial court disregarded the standard of a willing seller and substituted for it a personal standard of value is

[8] Besides the increased rental at the new premises many other items of consequential damage were considered at the trial. For example, the tenants were permitted to introduce evidence of the cost of renovating a sign used by a tenant at the old premises which "was kind of worn out, been up for a long time" (R. 177), the cost of photographs of a tenant's new location to send to the main office of the company (R. 200–201), and the cost of changing advertising cuts (R. 256).

evident from its rulings permitting condemnees to testify to their unwillingness to move (R. 174–175, 228, 259), *i. e.*, their reluctance to have their property condemned, as well as its rulings admitting evidence of moving expenses and other consequential damages to show "the loss to these tenants for being deprived of the use and occupation" of the premises (R. 160).

C. *The entire interests of the tenants were taken.*—As has been said, the court below conceded that the entire term of most of the tenants had been taken, but it held that the Independent Pneumatic Tool Company lease and "possibly" the Petty Motor Company lease were for terms longer than the temporary use taken by the Government (R. 624). Independent Pneumatic had a lease which expired November 30, 1942, but on August 10, 1942, it had obtained a new lease for five years commencing December 1, 1942 (R. 201–202). Both of these leases provided that (R. 202):

> If the whole or any part of the demised premises shall be taken by Federal, State, county, city, or other authority for public use, or under any statute, or by right of eminent domain, then when possession shall be taken thereunder of said premises, or any part thereof, the term hereby granted and all rights of the Lessee hereunder shall immediately cease and terminate, and the Lessee shall not be entitled to any part of any award that may be made for such taking, nor to any damages therefor except that the rent shall be adjusted as of the date of such termination of the Lease.

That Independent Pneumatic's interest was thus not carved up, leaving a part of its leasehold after Government occupancy ended, is made clear by the fact that a tenant whose lease provides for its termination upon a sale of the property by the owner or upon the taking of the leased premises for a public use, is entitled to no compensation when it is condemned.[9] Although the court below referred (R. 622) to this clause in the lease of Independent Pneu-

[9] *United States* v. *10,620 Square Feet, Etc., in the Canadian Pacific Building, supra; United States* v. *45,000 Square Feet, Etc., at 605–615 W. 42nd Street*, decided August 28, 1945 (S. D. N. Y.) (copies of which are lodged with the Clerk of this Court); *United States* v. *8,286 Sq. Ft. of Space in Paca-Pratt Building, Etc.*, 61 F. Supp. 737. (D. Md.); *United States* v. *21,815 Square Feet of Land, Etc.*, 59 F. Supp. 219 (E. D. N. Y.); *United States* v. *Improved Premises*, 54 F. Supp. 469 (S. D. N. Y.); *United States* v. *Certain Parcels of Land in Loyalsock Township, Etc.*, 51 F. Supp. 811, 812 (M. D. Pa.); *United States* v. *Inlots*, 26 Fed. Cas. No. 15441a, at page 492 (C. C. S. D. Ohio); *Burbridge* v. *New Albany and Salem R. Co.*, 9 Ind. 546; *Goodyear & Co.* v. *Boston Terminal Co.*, 176 Mass. 115; *In re Improvement of Third Street*, 178 Minn. 522; *Matter of Mayor of New York*, 168 N. Y. 254; *In re Water Front in Tompkinsville, Etc.*, 219 N. Y. App. Div. 387; *Scholl's Appeal*, 292 Pa. 262; see *In re Water Front*, 246 N. Y. 1, 31–34, certiorari denied, 276 U. S. 626; cf. *Zeckendorf* v. *Cott*, 259 Mich. 561; *United States* v. *3.5 Acres of Land in South Boston, Mass.*, 57 F. Supp. 548 (D. Mass.); *American Creameries Co.* v. *Armour & Co.*, 149 Wash. 690; *Boston* v. *Talbot*, 206 Mass. 82. The decision in *United States* v. *150.29 Acres of Land, Etc.*, 148 F. 2d 33 (C. C. A. 7), certiorari denied, June 18, 1944, *sub nom. Eline's Inc.* v. *Gaylord Container Corp., et al.*, October Term 1944, Nos. 1302–1303, supports this view, for it assumes that if the "condemnation clause", as properly construed, embraced condemnation by the Federal Government, the tenant could not share in the award.

matic Tool Company, it did not give any reason or cite any authority to support the view that, despite this clause, the tenant's interest was not terminated by condemnation. Nothing in the *General Motors* case warrants such repudiation of a lease clause as to permit a tenant whose interest has terminated to secure compensation. *United States* v. *21,815 Square Feet of Land in Borough of Brooklyn*, 59 F. Supp. 219 (E. D. N. Y.); *United States* v. *8,286 Sq. Ft. of Space in Paca-Pratt Building, Etc.*, decided July 25, 1945 (D. Md.).[10]

Respondent attempts to support the ruling of the court below with the assertion that this clause was merely for the benefit of the lessor and not the Government (Br. in Opp. pp. 11–12). But, as the court stated in *United States* v. *8,286 Sq. Ft. of Space in the Paca-Pratt Building, Etc.*, *supra*, with reference to a similar contention:

> This contention is not new. It was advanced and rejected in some of the older cases. The short answer given is that as the lease expires by its own provision when condemnation occurs, the lessee has no property interest taken by the Government, and therefore has no provable damage. *In re Imp. Third St.*, 178 Minn. 552; *Munigle* v. *City of Boston*, 3 Allen (Mass.) 230; *Scholl's Appeal*, 292 Pa. 262.

Nor does the fact that a settlement was made with the landlord change the result (cf. Br. in Opp. p. 12).

[10] 61 F. Supp. 737.

A condemnation proceeding, whether to take the fee or temporary use, is *in rem* against the property itself. *Duckett & Co.* v. *United States*, 266 U. S. 149, 151. Consequently the amount which the condemnor must pay cannot be increased by contracts or distribution of ownership of the property among different persons, and its liability is determined as if the property were in single ownership. That liability is discharged when the value of the interest taken is paid into court and, ordinarily, the division of ownership becomes important only in apportionment of the total award—a matter which does not concern the condemnor. *United States* v. *Dunnington*, 146 U. S. 338, 350–353; *United States* v. *Certain Lands in Hempstead, Nassau Cy., N. Y.*, 129 F. 2d 918, 919–920 (C. C. A. 2); *Silberman* v. *United States*, 131 F. 2d 715, 717 (C. C. A. 1); *Carlock* v. *United States*, 53 F. 2d 926, 927 (App. D. C.); *Meadows* v. *United States*, 144 F. 2d 751, 752–753 (C. C. A. 4); *Washington Water Power Co.* v. *United States*, 135 F. 2d 541 (C. C. A. 9), certiorari denied, 320 U. S. 747; *Mayor & C. C. of Balto.* v. *Gamse*, 132 Md. 290, 293; *Edmands* v. *Boston*, 108 Mass. 535, 544, 549; *State ex rel. Kafka* v. *District Court*, 128 Minn. 432, 436–437, 151 N. W. 144; *State* v. *Superior Court*, 80 Wash. 417, 420–421; *Detroit* v. *Fidelity Realty Co.*, 213 Mich. 448, 458–459.

Inasmuch as the United States settled with the owner, it does not deny that it is primarily liable to

the tenants.[11] However, the fact that a settlement in the form of a lease was made with one of the claimants, the landlord, does not change the nature of the proceeding. Contrary to respondent's assertions (Br. in Opp. pp. 3, 5, 12), the Government condemned, not merely the tenant's interests, but rather a "leasehold interest" in the building for the named period, including the interests of both the landlord and the tenants (R. 3–5).[12] Cf. *Duckett & Co.* v.

[11] The lease with the owner was not introduced in evidence. Since it did not mention the tenants (R. 567–568), no question is raised here as to whether the United States may be entitled to indemnity from the owner on the theory that the rental agreed upon was intended to cover any liability to the tenants. Cf. *United States* v. *Certain Parcels of Land in Loyalsock Township, Etc.*, 51 F. Supp. 811 (M. D. Pa.); *Lawrence* v. *Boston*, 119 Mass. 126.

[12] Throughout the proceedings below, the Government insisted that it was proceeding *in rem* against the property. Cf. R. 116, 118–119. Hence, it took exceptions when the court ordered dismissal as to the landlord but not as to the tenants (R. 568–569). Although a notice of appeal was filed as to the owner (R. 73–74) it was ineffective because no final judgment dismissing the owner was entered. *Wright* v. *Gibson*, 128 F. 2d 865 (C. C. A. 9); see *Western Electric Co.* v. *Pacent Reproducer Corporation*, 37 F. 2d 14 (C. C. A. 2), certiorari denied, 282 U. S. 873, and cases there cited. Consequently, the Government preserved the question in the only way possible by including the objection in the specification of errors in the court below (R. 86). This matter is irrelevant here so far as it relates to the owner's claim, since that claim has been settled. However, the Government submits that such settlement does not enlarge the tenant's rights, and that if, for some reason, dismissal of the owner should be thought to enlarge the rights of other claimants, such dismissal should be ignored since no judgment was entered thereon.

United States, 266 U. S. 149, 151. In other words, as this Court held in the *Duckett* case, *supra*, the United States proceeded *in rem* against the property. Thus, if, rather than settling with the owner, the United States had paid into court the total value of the leasehold estate it condemned, Independent Pneumatic would not have been entitled to share in the award. It is submitted that the rights of Independent Pneumatic are no greater in the instant case and hence, that that Company is not entitled to any award. Cf. *United States* v. *8,286 Sq. Ft. of Space in Paca-Pratt Building*, *supra*; *United States* v. *10,620 Square Feet, Etc., in Canadian Pacific Building*, *supra*. And this being so, it is, of course, true that Independent Pneumatic's leasehold did not extend beyond the term taken by the Government. To hold otherwise would largely discourage, if not prohibit, the making of settlements with lessors.

The Petty Motor Company had a lease for one year expiring October 31, 1943, with the right to renew for another year (R. 433–436). The Government took the premises until June 30, 1945, but it could have surrendered possession on June 30, 1943, or 1944 (see R. 3–5). The circuit court of appeals stated that this lease was a possible exception to those which terminated prior to the expiration of the use taken by the United States (R. 624). However, because of the construction given to the *General Motors* decision, the court below did not pass upon this question. It is submitted that the taking by the United States of more than thirty-one months' occupancy (from November 11, 1942, through June 30, 1945) terminated altogether the Petty Company's

interest, even though the Government's occupancy might have been relinquished earlier.[13] The Petty Company would, of course, be entitled to compensation for the remainder of its lease, which had almost a year (November 11, 1942–October 31, 1943) to run, with a right to renew for another year (to October 31, 1944).[14]

The interest condemned by the Government was a term for three years subject to a contingent limitation. 3 Thompson, *Real Property* (Perm. Ed.) Secs. 1178, 1017, pp. 243, 6. Indeed, Petty recognized this, for it claimed compensation for a taking of greater duration than a leasehold which would end either on June 30, 1943, or on June 30, 1944 (R. 424, 459). Thus, the term taken was longer than that of the Petty Motor Company, and Petty's position is, in this important respect, different from that of General Motors. Moreover, Petty was not bound to,[15] and did not continue paying rent (R. 573).

[13] Respondent has stated that the Army abandoned the Old Terminal Building less than a year after taking it (Br. in Opp. p. 11). The Pacific Division of the Army Engineers for whose use it was originally taken no longer occupies the building. However, the lease with the owner was renewed until June 30, 1945, and the building has been occupied by other branches of the War Department and other Government agencies after that date.

[14] Petty's valuation evidence was based on the assumption that its right to renew had already been exercised and, therefore, that its lease continued for two years (R. 424, 459). Petty introduced no evidence as to the separate value of its right to renew, and no question is here raised as to the value, if any, of such right.

[15] See Orgel, *Valuation under Eminent Domain* (1936) Sec. 119, pp. 405–406.

Rather than being chopped "into bits" (323 U. S. at 382), Petty's entire interest was taken.

To summarize, the entire interest of each of the tenants has been terminated. They are not under any liability either to pay rent or to return to the premises. At most, the date when they could have been compelled to move from the premises has been accelerated for a very short period. In fact, two of the defendants, Grocer Printing Company and Mutual Typesetting Company, received more than the fifteen days' notice to which they were entitled under Utah law (R. 7, Utah Code Ann. (1943) Secs. 104-60-3 (2)). See *infra*, p. 39.

Petitioner's reliance (Br. in Opp. p. 9) on *United States* v. *Chicago, B. & Q. R. Company*, 82 F. 2d 131 (C. C. A. 8), certiorari denied, 298 U. S. 689, is misplaced. Whatever the merits of that decision, and quite apart from the fact that that case involved the taking of a portion of a railroad easement, as to which an exceptional measure of compensation has long been accepted (cf. *United States* v. *Grizzard*, 219 U. S. 180), it is clear that the circuit court of appeal's suggestion in that case that cases like *Gibson* v. *United States*, 166 U. S. 269, have been overruled (82 F. 2d at 134-135), and that the words "or damaged" have now been added to the word "taken" in the Fifth Amendment (82 F. 2d at 139), cannot stand in the light of this Court's recent decisions. See, *e. g.*, *United States* v. *Willow River Co.*, 324 U. S. 499, 502, 510. The opinion in the *General Motors*

case, in any event, itself supplies sufficient answer to petitioners' argument. It was there said (323 U. S. at 379–380):

> The sovereign ordinarily takes the fee. The rule in such a case is that compensation for that interest does not include future loss of profits, the expense of moving removable fixtures and personal property from the premises, the loss of good-will which inheres in the location of the land, or other like consequential losses which would ensue the sale of the property to someone other than the sovereign. * * * Even where state constitutions command that compensation be made for property "taken or damaged" for public use, as many do, it has generally been held that that which is taken or damaged is the group of rights which the so-called owner exercises in his dominion of the physical thing, and that damage to those rights of ownership does not include losses to his business or other consequential damage.

It is submitted that, in these circumstances, this Court's decision in the *General Motors* case does not support the rulings of the courts below permitting the consideration of removal expenses and like consequential losses.

Frequently, space is needed by the Government for office purposes or for housing personnel which will not be required for permanent use. Accordingly, during the war emergency, the temporary use of a large number of buildings, such as apartment

houses and office buildings, has been taken.[16] Very often such buildings are occupied by tenants at will, tenants from month-to-month or tenants for other short periods less than the time for which the buildings are condemned. The result of the rulings of the courts below in this case is that when the United States condemned the only available space which would meet its requirements "and at the same time disturb the fewest possible tenants" (R. 373–374), it was required to pay a total of $10,000 to six tenants in addition to paying the owner the full rental value of the building.

In the short time that has elapsed since the *General Motors* decision, experience has already shown the lengths to which condemnees will go in their efforts to pass moving expenses and other consequential damages on to the Government. We have already adverted (*supra*, note 8, p. 22) to the items claimed to be relevant by petitioners here—like the cost of renovating a worn out sign used at a tenant's old premises; and, in other cases, such claims as tips to porters, the time of a vice-president and salesmen utilized in searching for new quarters, and meals for

[16] See S. Rep. No. 10, part 16, 78th Cong., 2d sess., p. 121. This is done pursuant to the policy expressed by Congress in the Military Appropriations Act of 1945, Pub. No. 374, 78th Cong., 2d Sess. (June 28, 1944) that property should be purchased "only when it would be more economical to purchase than lease, if leasing be possible, in cases where doubt prevails as to the land desired being permanently needed for military purposes."

men during moving, have been introduced as relevant factors. See *United States* v. *10,620 Square Feet, Etc. in Canadian Pacific Building, supra; United States* v. *45,000 Square Feet, Etc. at 605–615 West 42nd Street, supra.* Unless this Court reaffirms the limitations made in the *General Motors* case itself on the situations in which such evidence may be properly admitted, it is to be feared that the view of the court below will lead counsel and other courts to go even further in their claims and allowances.

We do not contend that the guarantees of the Fifth Amendment are any less during war time (cf. Br. in Op. p. 11). But because the exigencies of war have made it necessary to acquire much property for public use during a short space of time, the inconveniences and dislocations of property owners resulting from this cause have naturally been greater. Nevertheless, it has been long established that when the fee title to property is condemned, no allowance may be made for the types of injuries claimed here. See *supra*, pp. 16, 20–23. Respondents, who were subject to being required to move some time and thus, when their interests terminated, incur the expenses claimed here, should be in no better position than the owners and long-term tenants in cases where the fee is taken.

Respondent makes the general contention that the verdicts were far less than they might have been, or than respondent thinks they should have been, and that the substantial rights of the Government have

thus not been affected (Br. in Op. pp. 6, 13). But "In an eminent-domain proceeding, the vital issue—and generally the only issue—is that of just compensation." *McCandless* v. *United States*, 298 U. S. 342, 348. Therefore any ruling as to the measure of damages or elements to be considered in determining compensation affects the substantial rights of the parties and "is ground for reversal unless it *affirmatively* [17] appears from the whole record that it was not prejudicial." *McCandless* v. *United States*, 298 U. S. 342, 347–348; *United States* v. *River Rouge Co.*, 269 U. S. 411, 421. An examination of the record reveals that almost all of the evidence introduced by the tenants to show the value of their premises either consisted entirely of moving expenses and other consequential damages or was based largely upon a consideration of such items. Cf. *Atlantic Coast Line R. Co.* v. *United States*, 132 F. 2d 959, 963 (C. C. A. 5). The trial court instructed the jury to consider this inadmissible evidence. Since the jury is presumed to have followed the instructions of the court and to have considered what was practically the only evidence before it, it is inconceivable that the admission of the evidence and the instructions of the court setting forth an erroneous measure of compensation did not affect the substantial rights of the Government.

[17] Italics by the court.

II

MONTH-TO-MONTH TENANTS OF PROPERTY CONDEMNED BY THE GOVERNMENT ARE NOT ENTITLED TO COMPENSATION BASED UPON THE LENGTH OF TIME THEY MIGHT HAVE REMAINED IN POSSESSION OF THE PROPERTY

Although recognizing that month-to-month tenancies might be terminated at any time by the owner upon fifteen days' notice, the district court did not limit the compensation of those tenants to the value, if any, of their actual terms (see R. 140–141; 570–571). Instead, he instructed the jury that while a month-to-month tenancy was uncertain, it might "last a long time, as it had in many cases, for years and years and years" (R. 571) and submitted for determination by the jury "What length of time would that occupation fairly and reasonably cover, * * *" (R. 574).[18] The circuit court of appeals,

[18] This instruction thus permitted the jury to speculate as to whether the owner, who had purchased the building within a month of the condemnation proceeding, would continue the policies of his predecessors and would not attempt to raise the rents of the month-to-month tenants or notify them to vacate even though space was becoming scarce in Salt Lake City (R. 424–425). However, in the cases of the tenants claiming under written leases, such speculation was not allowed because the court, quite properly, limited their recovery to the unexpired terms of their leases (R. 572).

referring to the fact that the tenants had occupied their premises for many years, that the arrangement was mutually satisfactory to the tenants and the owner, and that the tenants had every reason to think they could remain indefinitely, characterized the claimants as "long-time tenants" and stated that "the record justifies the conclusion that each would have continued for an indefinite period had not the government begun condemnation proceedings" (R. 622).

These rulings, which respondents interpret as meaning that the month-to-month tenants "had a right so far as the Government is concerned to remain in the possession of their premises forever" (Br. in Opp. p. 8), disregard the fact that the just compensation provision of the Fifth Amendment is concerned solely with property rights. *United States* v. *General Motors Corp.*, 323 U. S. 373, 377–378; *Monongahela Navigat'n Co.* v. *United States*, 148 U. S. 312, 326. The United States is not required to compensate persons who do not possess enforceable rights but might possibly or probably be permitted to occupy or use the property.[19] As Mr. Justice Holmes pointed out in *Emery* v. *Boston Terminal Co.*, 178 Mass. 172, 185, where compensation was claimed on the basis of a custom over a period of 35 years to renew a lease whenever it expired: "Changeable in-

[19] The proper measure of compensation is, of course, a question of law which cannot be submitted to the jury, as was done by the trial court in this case (R. 159–160, 570, 576). Cf. *Chicago, Burlington &c. R'd* v. *Chicago*, 166 U. S. 226, 242.

tentions are not an interest in land, and although no doubt such intentions may have added practically to the value of the petitioners' holding, they could not be taken into account in determining what the respondent should pay. They added nothing to the tenants' legal rights, and legal rights are all that must be paid for. Even if such intentions added to the saleable value of the lease, the addition would represent a speculation on a chance, not a legal right." Cf. *Ranlet* v. *Railroad*, 62 N. H. 561. In fact, tenants from month-to-month have been said not to have such an interest in property condemned as to be entitled to any compensation. "The claim of a tenant in a condemnation proceeding is for the market value of the unexpired term of the lease. A month-to-month tenant * * * would have no such unexpired term and therefore would not be entitled to any award." *United States* v. *Certain Lands, Etc.*, 39 F. Supp. 91, 99 (E. D. N. Y.); cf. *Hanna* v. *County of Hampden*, 250 Mass. 107; *Tate* v. *State Highway Com'n*, 226 Mo. App. 1216; *Lyons* v. *Philadelphia & Reading Ry. Co.*, 209 Pa. 550.[20]

[20] The last three cases cited hold that a tenant at will has no estate which entitles him to damages when the premises are taken under the power of eminent domain. In those cases the tenancies at will were, under the laws of the particular states, essentially the same as tenancies from month-to-month under Utah law in that the notice required to terminate them was longer than that required in Utah to terminate a month-to-month tenancy. Compare Utah Code Ann. (1943) sec. 104-60-3 (2) with 6 Mass. Laws Ann. (Michie) c. 186, sec. 12; Mo. Rev. Stat. Ann. sec. 2971; and Pa. Stat. Ann. (Purdon Perm. Ed.) Tit. 68, sec. 361.

Similarly, the rule that only persons having enforceable interests in the property are entitled to compensation prevails in Canada where, by statute, full compensation must be paid "to all persons interested, for all damage by them sustained" and in England even under statutes extending the right to compensation to "occupiers". *Canadian Pac. R. Co.* v. *Alex. Brown Milling, Etc. Co.*, 18 Ont. L. Rep. 85, 15 Am. & Eng. Ann. Cas. 709 (1909); *The King* v. *Liverpool & Manchester Rly. Co.*, 4 Ad. & El. 650, 111 Eng. Repr. 931 (1836); *Syers* v. *Metropolitan Board of Works*, 36 Law Times Rep. (Eng. 1877) 277. In the *Canadian Pacific* case, *supra*, the trial court held that tenants holding over after the expiration of a lease which had not been renewed as provided in the lease "had at least their possession to give up",[21] and having this, they were entitled to have considered not only their legally enforceable rights but also the probability of future advantages including the probability of their being granted a new lease. 18 Ont. L. Rep. 91–92. This ruling was reversed, the appellate court holding that to be entitled to compensation a person must have "some definite interest in the land itself. The mere possession or occupation as tenant at will * * * is not * * * sufficient." 18 Ont. L. Rep. 85, 98. Not only is compensation limited to the legal interests in the property taken,

[21] This seems to be practically the same as the trial court's theory that the tenants had a "right of occupancy" and that their compensation, if any, was for "having to relinquish occupancy" of the premises (R. 569–570, 38).

but in some instances, the owner of a technical interest in the property is denied recovery of substantial compensation. For example, the owner of a possibility of reverter has no compensable interest in the property. *People of Puerto Rico* v. *United States*, 132 F. 2d 220 (C. C. A. 1), certiorari denied, 319 U. S. 752, and authorities cited at 132 F. 2d 222.

Moreover, as the district court said (R. 571) the United States could have secured possession of the property without liability to the tenants by acquiring only the lessor's interest and then giving the required notice to vacate.[22] See, *e. g.*, *Goodyear &c. Co.* v. *Boston Terminal Co.*, 176 Mass. 115. Awards totaling $9,400 were made to the month-to-month tenants, however, because the Government condemned a leasehold interest naming both the owner and the tenants as parties. Certainly, the compensation payable under the Fifth Amendment should not be affected by such formal variations in the manner in which the same result is reached.

It is submitted that the month-to-month tenants were entitled to no compensation for the taking of the Old Terminal Building. If, however, their right to fifteen days' notice is deemed sufficient to give them a compensable interest in the property, their compensation should be limited to the value of the interest they actually had. At best this would be the value of whatever portion of the fifteen days remained after the period between November 11, 1942

[22] See *supra*, p. 30.

and their dispossession (R. 7). The value of that short period, if any, should be determined in the same way that the term of Petty Motor Company, which extended to October 31, 1943, is to be valued.[23] This term should be valued by determining the market rental value of the tenant's premises for the number of days involved and subtracting there from the rent payable to the landlord. *Silberman* v. *United States*, 131 F. 2d 715, 718 (C. C. A. 1); *Carlock* v. *United States*, 53 F. 2d 926, 927–928 (App. D. C.); *Mayor & C. C. of Balto.* v. *Gamse*, 132 Md. 290, 295–298 (1918); *Fiorini* v. *Kenosha*, 208 Wis. 496, 501; see Orgel, *Valuation Under Eminent Domain* (1936), sec. 124.

Gray-Cannon Lumber Company introduced evidence as to the costs of improvements made to the premises taken, consisting of the expenditures made for a plate glass front, a ramp, an overhead door, and a built-in desk (R. 325–326). No separate allowance can be made for these items. They were all "an integral part of the building" and the landlord reimbursed the tenant for about half the cost (R. 326). Since the improvements became part of the realty, they were the property of the landlord and the tenant simply had a right to use them along with the rest of the property until the expiration of its lease in August 1941 (R. 323) and thereafter for the few days that it was entitled to remain in possession as a tenant from month-to-month. The

[23] See *supra*, note 14, p. 29.

tenant's rights in such improvements are, therefore, included when the rental value of the portion of the premises it occupied is determined. *United States* v. *150.29 Acres of Land, Etc.*, 148 F. 2d 33, 37 (C. C. A. 7), certiorari denied, *sub nom. Eline's Inc.* v. *Gaylord Container Corp.*, Oct. Term 1944, Nos. 1302–3. Insofar as these improvements were removable fixtures or personal property and were removed by the tenant, no compensation is owing because the tenants were not, as we have shown, entitled to have the costs of removal considered.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgments of the court below should be reversed.

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APPENDIX

Title II of the Second War Powers Act of March 27, 1942, 56 Stat. 177, c. 199, sec. 201, 50 U. S. C. App., Supp. IV, sec. 632, provides as follows:

SEC. 201. The Act of July 2, 1917 (40 Stat. 241), entitled "An Act to authorize condemnation proceedings of lands for military purposes," as amended, is hereby amended by adding at the end thereof the following section:

"SEC. 2. The Secretary of War, the Secretary of the Navy, or any other officer, board, commission, or governmental corporation authorized by the President, may acquire by purchase, donation, or other means of transfer, or may cause proceedings to be instituted in any court having jurisdiction of such proceedings, to acquire by condemnation, any real property, temporary use thereof, or other interest therein, together with any personal property located thereon or used therewith, that shall be deemed necessary, for military, naval, or other war purposes, such proceedings to be in accordance with the Act of August 1, 1888 (25 Stat. 357), or any other applicable Federal statute, and may dispose of such property or interest therein by sale, lease, or otherwise, in accordance with section 1 (b) of the Act of July 2, 1940 (54 Stat. 712). Upon or after the filing of the condemnation petition, immediate possession may be taken and the property may be occupied, used, and improved for the purposes of this Act, notwithstanding any other law. Property acquired by purchase, donation, or other means of transfer may be occupied, used, and improved, for the purposes of this section prior to the approval of title by the Attorney General as required by section 355 of the Revised Statutes, as amended."

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